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Cases:

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Statute:

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Miscellaneous:

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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ST. LOUIS UNION TRUST COMPANY, AS SUCCESSOR TRUSTEE TO LIBERTY CENTRAL TRUST COMPANY, AS SOLE RESIDUARY LEGATEE AND DISTRIBUTEE OF THE AMERICAN ESTATE OF WILLIAM J. ORTHWEIN, DECEASED, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR EIGHTH CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Eighth Circuit, entered in the above-entitled cause January 17, 1935 (R. 62), affirming a decision of the United States Board of Tax Appeals (R. 26).

OPINIONS BELOW

The findings of fact and opinion of the Board of Tax Appeals (R. 26) are reported in 28 B. T. A.

107. The opinion of the Circuit Court of Appeals (R. 59) is reported in 75 F. (2d) 416.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 17, 1935 (R. 62). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The decedent created an *inter-vivos* trust with directions (1) to pay the income therefrom for life to a daughter, upon whose death prior to that of the creator the trust should terminate and the corpus be delivered to the grantor; or (2) if the grantor predecease the daughter, for continuance of the trust with disposition of the income and corpus according to future contingencies.

The question is whether the interest of the decedent therein should be included in his gross estate as a transfer "intended to take effect in possession or enjoyment at or after his death", under Section 302 (c), Revenue Act of 1924.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved will be found in the Appendix, *infra*, pp. 12–13.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 28–31) are substantially as follows:

The decedent, William J. Orthwein, a citizen of the United States, died on September 4, 1925, then a resident of Switzerland.

The decedent, by indenture dated January 1, 1920 (R. 48), created an *inter vivos* trust, with which we are herein concerned, naming as trustee the Mercantile Trust Co., which was succeeded by the Mercantile Commerce Bank & Trust Co., one of the respondents herein. The Commissioner included in the decedent's taxable estate the then value of decedent's interest in the assets which constituted the corpus of this *inter vivos* trust.

Under the will of the decedent, executed November 28, 1923, he created another trust, of the American estate of the decedent, the provisions of this trust not being involved in this proceeding. He named as trustee of the trust under the will the Liberty Central Trust Co., who was also named as executor of the American estate. The Liberty Central Trust Co., as executor, made final distribution to itself as trustee of the trust created by the will, and was discharged as executor. Thereafter the St. Louis Union Trust Co. succeeded the Liberty Central Trust Co. as trustee under the will. The St. Louis Union Trust Co., as sole distributee in its trust capacity of the residue of the estate, would be liable to pay any additional estate tax on the *inter vivos* trust, and is therefore named as a respondent herein.

By the indenture creating the *inter-vivos* trust the decedent transferred various securities to the

trustee to hold, manage, and dispose of as an active trust and to pay the net income thereof to the decedent's daughter, Alma Feraldo, during her life and upon her death to make disposition of as provided in the indenture.

The indenture provided that if the daughter predeceased the grantor the trust should terminate and the trust estate should be paid over to the grantor, if living. The trustee was given discretionary power to terminate the trust when the trustee might deem it wise.

The trust indenture further provided that upon the death of the grantor's daughter, if the grantor were not then living the income should be used for the benefit of the grantor's wife if living, and after her death and the death of the daughter, if the daughter were survived by a child or children, then for their equal benefit during their minority, and upon their majority the corpus of the trust estate was to be distributed to them or the survivors of them. It contained a further provision for disposal of the trust estate to the next of kin of grantor in the event of the daughter leaving neither the grantor, his wife, nor any children of her own surviving her (R. 52–53).

The daughter did not predecease the decedent but survived him. The value of the trust securities at the date of decedent's death was $101,421.24 and the then value of the decedent's reversionary interest subject to the daughter's life estate was $34,544.06 (R. 30–31).

The Commissioner, in determining the deficiency claimed herein, included the reversionary interest at that value. Upon review, the Board of Tax Appeals decided against the Commissioner. The Circuit Court of Appeals affirmed the decision of the Board.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the value of the decedent's interest in the trust property should not be included in the gross estate of the decedent under Section 302 (c), Revenue Act of 1924, as a transfer intended to take effect in possession or enjoyment at or after death.

2. In affirming the Board of Tax Appeals on the authority of *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *May* v. *Heiner*, 281 U. S. 238; and *McCormick* v. *Burnet*, 283 U. S. 784.

3. In affirming the Board of Tax Appeals.

REASONS FOR GRANTING THE WRIT

1. The decision of the Circuit Court of Appeals in this case is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Commissioner* v. *Schwarz*, 74 F. (2d) 712. In that case the decedent had created a trust under which a stated portion of the income therefrom should be paid to his sister for life. The trust further provided that at the death of his sister—

> the Trustee shall pay, transfer, and deliver the principal of the said trust fund * * *

> to the Donor, if then living, and if not then living, in equal shares, per stirpes, to his descendants then living, and if neither he nor any descendant of his be then living, in equal shares to such of his brothers and sisters as shall be then living.

In the *Schwarz* case the Circuit Court of Appeals observed that the trust was created for the purpose of providing a fixed annual income to a beneficiary for life and held that the grantor clearly parted with no larger interest in the trust corpus. It distinguished such cases as *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *May* v. *Heiner*, 281 U. S. 238; *McCormick v. Burnet*, 283 U. S. 784, and its own decision in *Commissioner* v. *Wallace*, 71 F. (2d) 1002 (C. C. A. 2d), certiorari denied, 293 U. S. 600, upon the ground that there the remainders were in form or substance vested to persons other than the grantors and not, as in the *Schwarz* case, contingent on the time of his death.

The facts in the instant case are substantially identical with those in the *Schwarz* case. Here, the clearly expressed purpose was to create a life estate for the benefit of the daughter, upon whose death, prior to that of the grantor, the trust should terminate and revert to the creator. Not until the death of the grantor prior to that of his daughter, did there arise in the ultimate beneficiaries the right to share in the estate. It is submitted that the conclusion of the Circuit Court of Appeals for the Eighth Circuit that the statute was not aimed

at this situation is contrary to the purpose of Congress and the decisions of this Court. *Klein* v. *United States*, 283 U. S. 231.

2. The existing situation is in need of clarification. The justification of this tax is the fact that the decedent retained an interest in the corpus of the trust, which did not cease until his death. Under the indenture the trustee was required to return the property to the decedent if his daughter died during the decedent's lifetime. While it must be noted that other cases presented comparable situations, it is submitted that the authorities are not in harmony. This is best illustrated by the decisions in the instant case and the *Schwarz* case, which rely upon and distinguish the same cases while involving substantially identical facts. See *McCormick* v. *Burnet, supra; Helvering* v. *Duke*, 290 U. S. 591; *Wallace* v. *Commissioner*, 27 B. T. A. 902, affirmed *per curiam*, 71 F. (2d) 1002 (C. C. A. 2d), certiorari denied, 293 U. S. 600. The first of these cases was decided *per curiam* upon the authority of *May* v. *Heiner, supra*, which did not involve the same situation.

The question in *May* v. *Heiner, supra*, was whether the value of a trust created by the decedent under which she was enjoying the income for life could properly be included within her gross estate. It dealt with a situation where the decedent had an interest in the trust income but no interest in the trust corpus. In the *McCormick* case, *supra*, the Government contended that the decedent had

retained an interest in the corpus as well as in the income, but it was heard with and decided by this Court at the same time as *Morsman* v. *Burnet,* 283 U. S. 783, and *Burnet* v. *Northern Trust Co.,* 283 U. S. 782, in each of which an interest in the income but not in the corpus was retained by the decedent. All three cases were decided at the same time by *per curiam* opinions on the authority of *May* v. *Heiner.* *May* v. *Heiner* was in point with respect to the *Morsman* and *Northern Trust* cases. It was also in point with respect to the retained interest in the income in the *McCormick* case, but it had no application to a retained interest in the corpus. The *McCormick* case was heard on February 27, 1931, and decided *per curiam* on March 2, 1931. Moreover, the limitation in the *McCormick* case was more remote than in the case at bar. In the former the trust corpus could revert only if Mrs. McCormick, who was then approximately 88 years of age, outlived three children, while here it was provided that the trust corpus would revert if the decedent outlived one daughter.

The affirmance of the *Duke* case by a divided court shows that the principles of law involved were not agreed upon by a majority of the Justices sitting, and prevents the case from being an authority. *Hertz* v. *Woodman,* 218 U. S. 205, 213–214. This division in the Court is reflected in the existing uncertainty with respect to the taxability of trusts containing provisions similar to that in the case at bar.

The *Wallace* case, *supra*, affirmed *per curiam* by the Circuit Court of Appeals, was decided by the Board of Tax Appeals on the ground that under New York law the daughter took a vested remainder by the execution of the trust instrument, and that the interest of the decedent in the property rights fixed by that instrument "must be determined by the laws of the place where the estate is to be administered." The *Wallace* case differs from the instant one in that there the remainder was in the first instance given to another and to the grantor only if that other died before the termination of the grantor's life estate, while here the remainder is given in the first instance to the grantor and to others only if the grantor died before the termination of the life estate.

Since the decision of the *McCormick* case, this Court has sustained the decision of a state court that a similar statute "recognized the distinction between taking effect in possession or enjoyment and vesting in right, title or interest, and intended to reach a shifting of the enjoyment of property, although such shifting followed necessarily from a prior transfer of title *inter vivos.*" *Guaranty Trust Co.* v. *Blodgett*, 287 U. S. 509, 512. Since this Court declared (p. 513) "That such a tax does not conflict with any provision of the federal Constitution", it is evident that the only question for decision here is whether the tax asserted was within the intendment of Congress.

We submit that Congress intended to reach every substitute for a testamentary disposition. Cf. *Milliken* v. *United States*, 283 U. S. 15, 23. "The quality which brings the transfer within the statute is indicated by the context and manifest purpose." *United States* v. *Wells*, 283 U. S. 102, 116. The statute deals with transfers intended to take effect in possession or enjoyment in the same subsection with transfers in contemplation of death. In neither case was Congress dealing with the technical transfer of rights upon death. Transfers in contemplation of death are completed *inter vivos* but are nevertheless subject to an estate tax. Taxable transfers to take effect in possession or enjoyment at or after death do not depend upon the transfer of the right but upon the transfer of the possession or enjoyment. That obviously occurs at death where, as here, the remainder is contingent. *Sargent* v. *White*, 50 F. (2d) 410 (C. C. A. 1st).

In *Reinecke* v. *Northern Trust Co., supra*, this Court held that the words "to take effect in possession or enjoyment at or after his death" include interests "passing from the possession, enjoyment, or control of the donor at his death." We submit that such transfers include any case where, as here, death is the occasion of the shifting of the enjoyment of property—the economic benefits thereof or economic interests therein. *Tyler* v. *United States*, 281 U. S. 497. So long as the privilege of making a transfer has not been fully exercised, it may be reached by the tax (*Chase Nat.*

Bank v. *United States*, 278 U. S. 327), and Congress intended to reach it.

3. While the considerations in Point 2 were presented to this Court in the petition for certiorari in the *Wallace* case, *supra*, there was then no square conflict of decisions in the circuit courts of appeals such as now appears. Moreover, the Government in the *Wallace* case sought to impose a tax upon the whole value of the trust property, whereas the tax here involved is limited to one upon the value of the remainder.

CONCLUSION

It is respectfully submitted that certiorari should be granted in the instant case because of the conflict between two Circuit Courts of Appeals and further, that upon hearing there will be present an opportunity to settle the uncertainty regarding the application of the prior decisions of this Court. The lower Federal courts are not disposed to attempt to resolve the doubt and a review by this Court would be in the public interest. The existing confusion is detrimental to the proper administration of the revenue laws and promotes litigation.

STANLEY REED,
Solicitor General.

APRIL 1935.

APPENDIX

Revenue Act of 1924, c. 234, 43 Stat. 253:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth.
>
> * * * * *
>
> (h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act. (U. S. C., Title 26, Sec. 1094.

Treasury Regulations 68, promulgated under the Revenue Act of 1924:

> ART. 17. *General.*—All transfers at any time made by the decedent, other than bona fide sales for a fair consideration in money or money's worth, which were intended to take effect in possession or enjoyment at or after his death, are taxable, and the value, as

of the date of the decedent's death, of the property so transferred must be returned as a part of the gross estate.

ART. 18. * * *

Where there was no reservation of income or an annuity but it was intended that possession or enjoyment of the transferred property, or a portion thereof, should be postponed until at or after decedent's death, then the value of the entire property or of such portion, as the case may be, should be included in the gross estate. Thus a gift of the principal intended to take effect either in possession or enjoyment at or after the decedent's death is taxable, although the income or annuity was payable during the decedent's life to some-one other than himself. * * *

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